

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



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12-30-74

To be argued by  
PAUL D. WEXLER

In the  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

ESTHER FRIEDLANDER as Surviving Executrix of the  
Estate of Raphael Cohen,

Plaintiff-Appellant,

-against-

PETER I. FRIMBERG, SAMUEL SOKOL, WEBB & KNAPP,  
INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM  
ZECKENDORF, ZECKENDORF HOTELS CORPORATION,  
DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX  
SECURITIES CORP., AGNIN LAWSON & HOLLAND and  
HARRIS, KERR, FORSTER & COMPANY,

Defendants-Appellees.

Appeal from Order of the United States District  
Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE  
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In The  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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ESTHER FRIEDLANDER as Surviving Executrix of  
the Estate of Raphael Cohen,

Plaintiff-Appellant,

-against-

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP,  
INC., LOUIS ADLER, MARVIN GREENSPAN,  
WILLIAM ZECKENDORF, ZECKENDORF HOTELS  
CORPORATION, DRAKE ASSOCIATES, ALFRED  
KAPLAN, DOMAX SECURITIES CORP., AGRIN  
LAWSON & HOLLAND and HARRIS, KERR,  
FORSTER & COMPANY

Defendants-Appellees,

On Appeal from an Order of the United States  
District Court for the Southern District of  
New York

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BRIEF FOR APPELLEE  
WILLIAM ZECKENDORF

Introductory Statement

Appellee William Zeckendorf ("Zeckendorf")\* submits

\* The Record on Appeal erroneously states that the attorneys  
for William Zeckendorf also represent Webb & Knapp, Inc.,  
and Zeckendorf Hotels Corporation.



this brief in opposition to plaintiff-appellant's appeal from the order of the District Court dated and entered on April 22, 1974 (A-217) denying plaintiff-appellant's motion for class designation.

To avoid needless expenditure of the Court's time in reading duplicative briefs, Zeckendorf adopts, in full, the brief filed on behalf of appellees Peter I. Feinberg, Domax Securities Corp. and Drake Associates ("Feinberg Appellees").

The restraining order issued by the Bankruptcy Court with respect to Zeckendorf is discussed at length in plaintiff's brief. As the order relates primarily to Zeckendorf, we submit the following point as a supplement to the brief of the Feinberg Appellees.

The Zeckendorf Restraining Order  
Does Not Excuse Plaintiff's Neglect

The thrust of plaintiff's argument is that its neglect in prosecuting this purported class action is excused by the dilatory behavior of defendants. In particular, plaintiff claims that it could not pursue this case because of the restraining order issued by the Bankruptcy Court in a chapter XI proceeding involving defendant Zeckendorf (A-56).

Judge Ward's opinion below makes it clear that the restraining order did not excuse the dilatory conduct of plaintiff. While such order would necessarily cause plaintiff some inconvenience and, perhaps, additional work in the early stages of this case, it certainly does not justify plaintiff's total failure to act in the matter. Plaintiff could have, and should have, sought to obviate the effects of the stay, yet did not do so. Plaintiff's failure to take any action, either through ignorance or choice, only serves to underscore the wisdom of Judge Ward's decision.

Plaintiff's most obvious course would have been to apply in the Bankruptcy Court -- as is often done -- for a vacation or modification of the stay order, so as to permit continued prosecution of the action to judgment against Zeckendorf or, alternatively against at least the other defendants. If such motion was granted, plaintiff could have vigorously prosecuted all or the main part of this action.

Indeed, there is every reason to believe such a motion by plaintiff would have been successful. Bankruptcy restraining orders are designed to stay two types of proceedings: (1) in rem suits by creditors which interfere



with assets within the custody of the Bankruptcy Court; and (2) in personam suits against the bankrupt which seriously interfere with the administration of the estate. See, Collier on Bankruptcy (14th Ed.) ¶ 2.61, at 327-328 (1974). This lawsuit does not seem to fit into either of these categories. It is an in personam suit that, in light of Zeckendorf's peripheral position as a defendant, could hardly have been considered a serious interference with the administration of the estate. Therefore, it is likely that, upon proper application, the Bankruptcy Judge would have lifted the stay and allowed the case to proceed.

But, plaintiff never made that application - an omission which, in and of itself, is ample support for the District Court's decision.

Moreover, yet another course was available to plaintiff which was simply ignored. Plaintiff could have discontinued the action as against Mr. Zeckendorf, while prosecuting the action against the other defendants. At a later date, without any prejudice to his case, plaintiff could have reinstituted the suit against Zeckendorf. At one point, plaintiff wrote to Zeckendorf's counsel (A-60) indicating that he would, in fact, pursue this course in order to move this case forward. Yet, plaintiff never

attempted to effect the discontinuance and Zeckendorf's counsel heard nothing more of the matter for almost three years.

Clearly, the restraining order was not responsible for this delay. Only plaintiff is to blame.

Conclusion

For the foregoing reasons, plaintiff cannot rely on the bankruptcy restraining order to excuse its neglect in prosecuting this action. The order of the District Court should be affirmed.

Respectfully submitted,

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POLACK & SINGER

~~ATTORNEY~~

by Ira J. Sand

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